

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Petition of Time Warner Cable for)	WC Docket No. 06-55
Declaratory Ruling that Competitive)	
Local Exchange Carriers May Obtain)	
Interconnection Under Section 251 of)	
The Communications Act of 1934, as)	
amended, to Provide Wholesale)	
Telecommunications Services to VoIP)	
Providers.)	

COMMENTS OF THE NEBRASKA PUBLIC SERVICE COMMISSION

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TABLE OF CONTENTS

SUMMARY	3
I. INTRODUCTION AND SUMMARY	4
II. ARGUMENT.....	7
A. The Petition for Declaratory Ruling should be Dismissed	7
B. The Commission Should Determine that a Declaratory Ruling is Unnecessary	8
C. The NPSC Properly Decided the Issues in the Arbitration Proceeding.....	10
D. The NPSC Did Not Block Time Warner's Entry In Rural Areas	13
E. The Commission Must be Able to View the Entire Record in the NPSC Arbitration	14
F. The NPSC Properly Determined that the Other Voluntary Interconnection Agreement Which Time Warner Used to Enter the Market Was Irrelevant.....	15
III. CONCLUSION	16

SUMMARY

The Commission should dismiss the Time Warner Petition due to procedural deficiencies as it relates to the Nebraska Public Service Commission's arbitration decision involving Sprint Communications Company L.P. and Southeast Nebraska Telephone Company. Time Warner failed to serve the Petition on the NPSC contrary to the Commission's rules of procedure. In addition, the Commission should either reject the Petition or require Time Warner to re-file the Petition with an explanation of where there is an "uncertainty" or "controversy" which the Commission can resolve. The Commission should determine that the declaratory statement Time Warner seeks is not applicable to the NPSC decision and dismiss or deny the Petition accordingly.

Should the Commission reach the merits of the Petition, the Commission should require Time Warner to produce its confidential agreement with Sprint so that the Commission can review the complete record. In light of the fact specific nature of the inquiry made by the majority of the NPSC and in review of the entire record, the Commission should determine that the NPSC's arbitration decision was correctly reasoned based on the evidence provided and that the NPSC's decision is consistent with current federal law. Accordingly, the Petition should be denied as it relates to the NPSC.

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COMMENTS OF THE NEBRASKA PUBLIC SERVICE COMMISSION

Pursuant to the Federal Communications Commission's (Commission's) *Public Notice*¹, the Nebraska Public Service Commission (NPSC) hereby submits the following comments in response to the Petition for Declaratory Ruling filed by Time Warner Cable ("Time Warner").²

I. INTRODUCTION AND SUMMARY

In June of 2004, Time Warner Cable Information Services (Nebraska) LLC (TWCIS) filed an application for a certificate of public convenience and necessity to

¹ *Pleading Cycle established for comments on Time Warner Cable's Petition for Declaratory Ruling that Competitive Local Exchange Carriers may Obtain Interconnection to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Public Notice (March 6, 2006) ("*Public Notice*").

² *In the Matter of the Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-54 (March 1, 2006) ("*Petition*").

provide facilities-based local and interexchange voice services within the state of Nebraska. On November 23, 2004, the Commission issued TWCIS a certificate to provide local and interexchange voice services in the requested territory.³ In C-3228, the NPSC ordered TWCIS to file notice with the NPSC prior to offering service in competition with Southeast Nebraska Telephone Company (SENTCO) or any other rural carrier.⁴ The NPSC also stated it considered TWCIS a necessary party to any interconnection agreement negotiations which would enable it to offer voice services to the public. TWCIS did not appeal or otherwise challenge this order.

In Application No. C-3429,⁵ Sprint Communications Company LP (Sprint) filed a Petition for Arbitration with Southeast Nebraska Telephone Company (SENTCO). SENTCO is a rural carrier subject to the exemption in Section 251(f) of the Act. Sprint asked the NPSC to define “end user” or “end user customer” to include a reference to a third party. Sprint also sought to include third party traffic in its reciprocal compensation agreement including traffic not generated by or terminated to the end user customers physically located within SENTCO’s certificated area. After discovery, testimony and exhibit designations had been made, the NPSC held a hearing on the arbitrated issues on August 10, 2005. The NPSC issued its findings and conclusions on September 13, 2005.

³ *In the Matter of Time Warner Cable Information Services (Nebraska), LLC, d/b/a Time Warner Cable, Stamford, Connecticut, for a certificate of authority to provide local and interexchange voice services within the State of Nebraska*, Application No. C-3228, GRANTED (November 23, 2004)(“C-3228”).

⁴ See C-3228 at 6.

⁵ *In the Matter of the Sprint Communications Company L.P.’s Petition for Arbitration with Southeast Nebraska Telephone Company, Falls City, under the Telecommunications Act*, Application No. C-3429, Findings and Conclusions (September 13, 2005)(“C-3429 Order”).

In order to resolve the issues presented to the NPSC, it was first necessary to determine whether Sprint was a “telecommunications carrier” as defined by 47 U.S.C. § 153 (44) when it executed its confidential contract⁶ with Time Warner. The NPSC conducted a fact specific inquiry about the nature of Sprint’s request for interconnection and a majority of the NPSC ultimately determined that Sprint had failed to demonstrate that it was acting as a “telecommunications carrier.” The NPSC found Sprint had failed to demonstrate it was providing its service indiscriminately so as to make its service effectively available to end users.⁷ In determining these issues on the record, the majority of the NPSC found that Sprint did not have the right to assert interconnection obligations upon SENTCO in this particular case.⁸ The NPSC also found based on the evidence provided, that the entity operating the switch or functional equivalent in this case was Time Warner. Thus, it was up to Time Warner and not Sprint to assert reciprocal compensation rights.

Time Warner did not intervene in the arbitration and did not otherwise participate in the arbitration proceeding. Questions surrounding Time Warner’s network capabilities and the propriety of the business arrangement with Sprint were objected to by Sprint in the arbitration. Time Warner’s failure to intervene in the arbitration left Sprint to explain inconsistencies with the testimony provided in the Time Warner case to the testimony in the Sprint arbitration. SENTCO had argued that Sprint’s testimony regarding the network arrangement was inconsistent with the testimony previously given by Time Warner in C-3228. The NPSC reviewed the evidence presented in the

⁶ This agreement was subject to a protective order and therefore is not included in the record attached to these comments.

⁷ *C-3429 Order at ¶ 27.*

⁸ Commissioner Anne Boyle dissented in the findings and conclusions reached by the NPSC.

arbitration and gave due consideration to the facts presented. In the end a majority of the NPSC found Time Warner should expeditiously work towards an interconnection agreement to provide service to customers in the Falls City exchange as Sprint had not demonstrated that it was a telecommunications carrier. Opposing vote found that Sprint had met the criteria.

After the NPSC's decision in C-3429, Sprint filed a complaint against the NPSC in the United States District Court in the District of Nebraska.⁹ Time Warner filed a Petition for Intervention in the U.S. District Court proceeding and the court denied Time Warner's Petition. The court granted Time Warner leave to file an amicus brief. Time Warner filed a request for reconsideration of the court's decision which was denied. The present Petition attacking the NPSC's order follows shortly after its request for reconsideration of the federal court's decision was denied. For the Commission's consideration, attached to these comments is the stipulated record in the U.S. District Court action. However, much of the record from which the NPSC's decision was based cannot be attached as the Time Warner/Sprint agreement was a confidential contract subject to a protective order.

II. ARGUMENT

A. The Petition for Declaratory Ruling should be Dismissed

Time Warner seeks a ruling by the Commission in order to effectively preempt the arbitrated findings of the NPSC as well as the orders of the South Carolina Commission.

⁹ See *Sprint Communications Company LP v. Nebraska Public Service Commission*, et al., Case No. 4:05 CV 03260.

Consequently, Time Warner was obligated to comply with 47 C.F.R. § 1.1206 which requires petitioners in declaratory ruling actions to serve the original petition on any state or local government, the actions of which are specifically cited as a basis for preemption. To date, the NPSC has not been served by Time Warner with the Petition for Declaratory Ruling. As a result, according to Commission Rules, the Petition should be “dismissed without consideration as a defective pleading and treated as a violation of the ex parte rules unless the Commission determines that the matter should be entertained by making it part of the record under § 1.1212(d) of the section and the parties are so informed.”¹⁰ The Petition should be dismissed without further consideration in accordance with this rule.

B. The Commission Should Determine that a Declaratory Ruling is Unnecessary

In the event the Commission decides not to dismiss the Petition outright, it should consider the Petition unnecessary and use its discretion to deny or dismiss the Petition. Time Warner’s stated issue for resolution, which appears to be a statement that competitive local exchange carriers may obtain interconnection to provide wholesale telecommunications services to VoIP providers, is not an issue in controversy. The Petition seeks a general statement of law that competitive local exchange carriers may obtain interconnection under Section 251 of the Communications Act of 1934 as amended (the Act) to provide wholesale telecommunications services to VoIP providers.¹¹ However, there is no uncertainty as to the status of the law where the

¹⁰ 47 C.F.R. § 1.1206 (note 1 to paragraph a).

¹¹ Petition at 1. It should be noted that the Petition is not clear on this point. The Petition generally is vague as to the declaration to be issued. On page two of the Petition, Time Warner states” The

NPSC is concerned. The NPSC accorded the weight of the evidence presented in the arbitration case and made factual determinations based on federal statutory and case law presented by both parties. The NPSC's order is correct in consideration of the record in the arbitration proceeding. However, as discussed below, Time Warner makes several mischaracterizations of the NPSC's order to make it appear to the Commission that there is some legal "uncertainty" or "controversy."

If there truly was an issue of "uncertainty" or "controversy" this issue would have been raised in Sprint's complaint against the NPSC in court. Not surprisingly, Sprint does not even mention the purported "wholesale" issue that Time Warner says is in question in its prayer for declaratory relief. Sprint, in its complaint against the NPSC seeks a declaration that it is a "telecommunications carrier" and that SENTCO is required to interconnect with Sprint.

Time Warner also argues a ruling is necessary to ensure that a "present uncertainty regarding the classification of VoIP" does not affect wholesale interconnection rights.¹² The NPSC was not faced with this issue in its arbitration. As the attached record of the NPSC arbitration decision indicates, the nature or classification of VoIP or the ability of VoIP providers to obtain interconnection was never an issue. Therefore, Time Warner cannot attribute this as an "uncertainty" or issue in "controversy" as it relates to the NPSC.

Commission should issue a declaratory ruling to ensure a consistent national interpretation of the applicable federal law and to remove the entry barrier caused by these state commissions' clearly erroneous interpretation of governing law." From this statement, it is difficult to ascertain what statement of law Time Warner is seeking. Accordingly, as Time Warner does not provide a clear statement of the declaration it is seeking there are fundamental due process concerns. Further, Time Warner's Petition fails to provide notice of the "applicable federal law" for which it seeks a consistent national interpretation. It seems, Time Warner simply wants the Commission to enter an order stated that the NPSC decision was wrong. If so, an action for declaratory ruling is not an appropriate vehicle for this purpose.

¹² Petition at 19.

Again, the heart of the question presented to the NPSC in its arbitration was really whether Sprint was engaged in private carriage or offering service as a common carrier. This was a question for the trier of fact to determine. The NPSC never held that wholesale telecommunications service providers could not obtain interconnection. Rather, the NPSC acknowledged that service can be offered indirectly by telecommunications carriers.¹³ In addition, the NPSC did not make any distinction unique to VoIP providers. Accordingly, the Petition fails to properly state an issue of “uncertainty” or “controversy” as it relates to the NPSC. The Petition should be dismissed or denied relative to the NPSC’s arbitration decision.

C. The NPSC Properly Decided the Issues in the Arbitration Proceeding

As the Act provides, to assert rights under § 251(a) or (b), an entity must be a “telecommunications carrier” as defined in 47 U.S.C. § 153(44). A telecommunications carrier is “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services....”¹⁴ Section 153(46) defines “telecommunications service” as the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used.” In order for an entity to be a “telecommunications carrier” it must first be a common carrier.¹⁵ A common carrier must hold “itself out to serve indiscriminately”¹⁶ The D.C. Circuit in *NARUC I* held “a carrier is not a common

¹³ See *C-3429 Order* at ¶ 23.

¹⁴ 47 U.S.C. § 153 (44).

¹⁵ See *Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999)(“VITELCO”).

¹⁶ *VITELCO*, 198 F.3d at 927; citing *National Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C.Cir. 1976) *cert denied*, 425 U.S. 992 (“NARUC I”).

carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”¹⁷

In the case presented to the NPSC, the record demonstrated Sprint individually negotiates its arrangements with potential customers for its network services. The needs of its customers vary, therefore the contracts are tailored to those individual needs. The two contracts presented to the NPSC for confidential review were distinct, privately negotiated agreements. While a Sprint witness stated that Sprint had at one time contacted cable providers to determine if they want to enter into a contractual agreement, there was no evidence substantiating this testimony.¹⁸ Based on the record evidence, the NPSC found the two individually tailored confidential agreements were hardly proof that Sprint’s services were being offered indiscriminately to all potential users in a class.

Despite Time Warner’s arguments to the contrary to the Commission in the present Petition, Sprint did not demonstrate to the NPSC that it “offers its services indifferently to all within the class of users.” To the contrary, many of the claims now argued by Time Warner in its Petition are unsubstantiated by the record in the NPSC arbitration.

First, Time Warner states in its Petition that the services “Sprint and MCI offer to customers such as Time Warner Cable are available pursuant to tariff” filings.¹⁹ Sprint was pressed squarely on this issue during the arbitration. Sprint had not presented any evidence by way of a tariff offering that its service was being offered indiscriminately to all within the class of users. Sprint is well aware that the NPSC requires a tariff to be

¹⁷ 525 F.2d at 641.

¹⁸ Sprint could have very easily provided written proof of this claim and did not. Accordingly, the NPSC did not give great weight to this testimony.

¹⁹ Petition at 17.

filed by all telecommunications carriers prior to them even *offering* of telecommunications services in Nebraska. If Sprint was truly acting as a telecommunications carrier in this regard it would have filed an amended tariff for the services it planned to offer to Time Warner and other like providers. Notwithstanding that, Sprint had offered only its confidential agreement with Time Warner and one other confidential agreement as evidence in the hearing. This evidence was produced after discovery made it necessary and after a protective order had been issued. Both agreements were individually tailored making it clear that in each case Sprint and its client determined “whether and on what terms to serve.”²⁰ Absent from Sprint’s proof on this issue was any demonstration of a “compulsion to serve all indifferently” as required by *Southwestern Bell* or that it was *actually* holding itself out to serve all indifferently to show common carrier status.²¹

Further, contrary to what Time Warner states in its Petition, the NPSC’s decision in the arbitration proceeding did not hinge on the mere fact that Sprint memorialized its arrangement with Time Warner in a contract.²² Rather, the NPSC viewed the entire record and determined that Sprint had not undertaken to carry for all persons indifferently.²³ As Time Warner is well aware, the mere fact that Sprint is a common carrier with respect to some forms of telecommunications service does not lead to the conclusion that Sprint acts as a common carrier for all services. “It is at least logical to conclude that one can be a common carrier with regard to some activities but not

²⁰ *Southwestern Bell Telephone Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)(“*Southwestern Bell*”).

²¹ *See id.*; *see also NARUC II*, 553 F.2d 608-609.

²² *See* Petition at 17.

²³ *C-3429 Order* at ¶¶ 24-27, *citing VITELCO*, 198 F.3d 925. *See also Southwestern Bell*, 19 F.3d at 1480.

others.”²⁴ Indeed, as the D.C. Circuit has found, “there is no inherent inconsistency in recognizing that some filings of contracts may be just that: the filing of private contracts for private carriage.”²⁵

Finally, the NPSC’s decision did not turn on the question of whether Sprint was a wholesale provider or retail provider. Time Warner mischaracterizes the NPSC’s findings in this regard and seems to place a great deal of importance on the term “wholesale.” The NPSC properly used the analysis of whether Sprint was a “common carrier” from *NARUC II* and *VITELCO*. In fact, the NPSC is well aware from observing the *VITELCO* decision that the “wholesaler” distinction is not dispositive.²⁶ The NPSC’s holding in the arbitration case was that Sprint had failed to demonstrate that it was a common carrier and therefore not a telecommunications carrier able to invoke §§ 251 and 252 of the Act.

The NPSC submits that its arbitration order speaks for itself. The Commission should not be swayed by the many mischaracterizations of the NPSC’s decision in the Petition or by Time Warner’s attempt to portray the NPSC’s decision as anticompetitive.

D. The NPSC Did Not Block Time Warner’s Entry In Rural Areas

²⁴ *NARUC II*, 533 F.2d at 608.

²⁵ *Southwestern Bell* 19 F.3d at 1481.

²⁶ *VITELCO*, 198 F.3d at 930.

In addition to Time Warner's unsupported claims discussed above, Time Warner states repeatedly that the NPSC blocked its entry into rural areas.²⁷ These statements are wholly without merit. The NPSC has acted only to advance competitive entry in Nebraska. The NPSC issued Time Warner a certificate to provide telecommunications services in Nebraska over heated opposition. The NPSC has likewise worked with Time Warner on tariff and other compliance issues after Time Warner entered the market in Lincoln. Absolutely nothing forecloses Time Warner's ability to seek interconnection with Nebraska carriers.

Aside from SENTCO's promise to negotiate with Time Warner in good faith on interconnection terms and conditions, the NPSC has the authority to ensure that parties to a Section 252 negotiation are acting in good faith. However, there is no evidence that Time Warner was willing to negotiate terms with SENTCO. It has simply chosen not to make a request for interconnection with the SENTCO. In fact, had Time Warner made a request for interconnection with SENTCO to begin with, Time Warner may be offering service in Falls City today. There is no question that the Commission should give little credence to the Petitioner's arguments that the NPSC has somehow blocked its entry into the rural Nebraska market.

E. The Commission Must be Able to View the Entire Record in the NPSC Arbitration

²⁷ Petition at 7.

The NPSC submits that in order for the Commission to properly consider the claims made in Time Warner's Petition, the Commission must obtain copies of the confidential portion of the NPSC's record in C-3429. As previously discussed, the non-confidential record of the proceedings before the NPSC is attached to these comments. However, one volume of the record is subject to a protective order entered by the NPSC's decision in C-3429 filed by Sprint. This confidential volume includes two contracts between Sprint and cable television providers that Sprint has declared to be confidential. Based upon its consideration of the complete record in C-3429, including the confidential portions thereof, the NPSC appropriately made the determinations and findings of fact set forth in the NPSC's decision in C-3429. In order for the Commission to properly consider Time Warner's claims, the Commission should require Time Warner to produce the confidential contracts. Such contracts should also be made available to the commenting parties in this proceeding. Without the confidential information, significant portions of the record are missing and the Commission cannot fairly judge the merits of the NPSC's decision and the parties providing comment to the Commission in this proceeding cannot properly assess NPSC's decision.

F. The NPSC Properly Determined that the Other Voluntary Interconnection Agreement Which Time Warner Used to Enter the Market Was Irrelevant

Of some further importance to Time Warner in its Petition was the fact that the NPSC approved an agreement between Sprint and Alltel in Nebraska which enables Time Warner to provide services in the Lincoln area.²⁸ This issue was raised by Sprint in the arbitration proceeding and was dismissed by the NPSC as irrelevant.²⁹ Approval of that agreement was not inconsistent with the issues raised in the Sprint arbitration. In the Sprint/Alltel case, the parties voluntarily negotiated terms and conditions and the other issue for the NPSC to consider in that case was whether the agreement was discriminatory and whether implementation of the agreement was within the public interest.³⁰ The NPSC was not faced with the issue of whether the parties were telecommunications carriers or whether one party had a right to assert the provisions of § 251(a) or (b). The NPSC properly dismissed that voluntarily negotiated agreement as irrelevant as it had no bearing on the issues presented in the arbitration.

III. CONCLUSION

For the foregoing reasons the Petition for Declaratory Ruling filed by Time Warner should be dismissed. In the alternative the relief sought by Time Warner should be denied.

Respectfully Submitted,

The Nebraska Public Service Commission

²⁸ See Petition at 7, n.15.

²⁹ See *Stipulated Record in Sprint Communications Company LP v. Nebraska Public Service Commission*, et al., Case No. 4:05 CV 03260-TDT (*attached*) at 0136.

³⁰ See 47 U.S.C. § 252(e)(2).

I, Shana Knutson, do hereby certify that on this 10th day of April, 2006, a copy of the foregoing (without attachment) was sent via U.S. mail, postage prepaid, to the following:

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A copy of the foregoing (with attachment) was also sent electronically to:

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/s/ Shana Knutson
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